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The Rights and Remedies of One Who Improves the Land of Another under the South Carolina Betterment Statute

Robert M. Ehrhorn Jr.

THE RIGHTS AND REMEDIES OF ONE WHO IMPROVES THE LAND OF ANOTHER UNDER THE SOUTH CAROLINA BETTERMENT STATUTE

I. Introduction

The subject of this note concerns the rights and remedies, and the situations under which they may arise, of one who erects improvements on the land of another as provided by the South Carolina Betterment Statute.[1] At the outset a distinction should be made between the class of persons who are within the protection of the statute and those who are merely trespassers. Ordinarily trespassers are not entitled to compensation for improvements they have made on the land of another, even though the landowner has been substantially enriched thereby, because the trespassers have no equitable support for their claim. It would certainly be unjust to require a landowner to reimburse such a wrongdoer for improvements he may have made as a condition precedent to recovering his land. However, there is a class of persons who stand in a substantially different position with respect to a right to compensation from the landowner whose land has been enhanced in value by reason of the improvements so made.[2] Admittedly the improver in this case has no better title to the land than the trespasser has, but his claim arises from the fact that he has occupied the land with a strong and reasonable belief in his title which is usually supported by a deed invalid for reasons not appearing on its face. It would be highly inequitable in such a case to allow the owner of the fee to reacquire his land, which may be enhanced many times in value, without any obligation to compensate the dispossessed occupant at least for part of his expenditures. Therefore, in order to protect the equity of such an improver in his improvements, practically all jurisdictions including South Carolina have enacted "occupying claimant" or "betterment" statutes.

A statutory remedy is practically the only way by which the rights of an improving occupant may be protected, since at common law there was no remedy, and any landowner who was fortunate enough to have his land improved received a windfall gain for which he was not obligated to pay. The theory was that

1. S.C. Code Ann. §§ 57-401 to -410 (1962).

2. 27 Am. Jur. *Improvements* § 10 (1940); 42 C.J.S. *Improvements* § 7 (1944); 10 Thompson, Real Property § 5299 (1924).

all improvements placed on the land became part of the realty vesting title to them in the owner of the fee.[3] There was also the argument in the common-law courts that a land owner should not have to pay for improvements or betterments which he did not authorize and for which he may have no use.[4] Needless to say, this rule caused considerable hardship to the improving occupant, who had no intent to defraud the landowner, by giving the landowner a benefit which he did nothing to earn. The civil law, however, rejected this view and recognized the idea that one ought not to enrich himself at the expense of another. Under the civil law view the good faith occupier would be entitled to complete compensation for the improvements he placed on the land less the amount claimed for loss of rents and profits by the owner.[5] Equity follows the rule of the civil law and the maxim that "one who seeks equity must do equity," and would therefore recognize the claim of an improving occupant in those cases where an equity court had jurisdiction. This arises when the plaintiff in ejectment had only an equitable title to the land or when he was asserting a claim for rent or mesne profits lost during the period of the defendant's occupancy. However, the modified equity rule adopted in the common-law jurisdictions placed severe limitations on the improver's right to claim compensation. The claim may only be asserted against the owner's claim for rents or profits and then only as a set-off against the rents and profits awarded the owner. No claim could be made by the improver for any amount that the value of the improvements might exceed the value of rents and profits,[6] and for this reason the improver was in no better position than he was under the strict common law rule. The right to deduct the value of improvements from the rent did not give the improver any real advantage because the rent collectible by the landowner was only that which the land in its unimproved state would bring in,[7] and the improvements may have enhanced the value of the land far beyond its unimproved rental value. At best equity provided only a negative gain, and at worst there was a strong possibility of heavy loss to the improver. This was the situation that prompted the enactment of betterment statutes in one form or another in practically all jurisdictions.

3. THOMPSON, REAL PROPERTY § 5295 (1924).
4. Annot., 57 A.L.R.2d 263 (1958); 27 AM. JUR. *Improvements* § 5 (1940).
5. 42 C.J.S. *Improvements* § 6 (1944).
6. 10 THOMPSON, REAL PROPERTY §§ 5296, 5297 (1924).
7. Annot., 24 A.L.R.2d 11 (1952).

The general purpose of all such statutes is to protect those rights of improving occupants which equity courts had long recognized by affording them compensation for their improvements. In light of the fact that the statutes are clearly in derogation of the common-law, some courts have construed them strictly. However, others have considered the fact that they are remedial in nature and have interpreted them liberally so as to effectuate their underlying social purpose.[8] There is also some variation among the different jurisdictions as to whether the statutes are to provide the sole or exclusive remedy, or merely to supplement equity in situations not provided for in the statutes. Despite these variations from state to state, however, all the statutes perform basically the same function: to compel the owner of land to pay over to one who occupied the land with a good faith belief in his title the value of the improvements thereby erected as a condition to recovering the land.[9]

A. The South Carolina Statute

Prior to the enactment of the betterment statute,[10] South Carolina followed the modified equity rule under which an improver was allowed to set off the value of his improvements against the claim of the landowner for rents or profits, but where no recovery could be had for the amount by which the value of the improvements exceeded the value of rents and profits.[11] The original betterment statute was enacted in 1870 to fulfill the need stressed previously by "softening the asperities of the law and affording relief where none otherwise existed,"[12] and since that time it has been modified to cope with different situations as they have arisen. The South Carolina Supreme Court has tended toward a fairly liberal construction of the statute noting its underlying social policy. However, since the statute provides for a new and exclusive remedy the court has limited its application to those situations where no remedy had previously existed.[13] The statute has consistently been held to have no application to partition actions among co-tenants. The co-tenant im-

8. 42 C.J.S. *Improvements* § 6 (1944).

9. *Ibid.*

10. S.C. CODE ANN. §§ 57-401 to -410 (1962).

11. Martin v. Evans, 1 Strob. Eq. 350 (S.C. 1847); Dellet v. Whitner, Chev. Eq. 213 (S.C. 1839).

12. Tumbleston v. Rumph, 43 S.C. 275, 279, 21 S.E. 84, 86 (1895).

13. Howard v. Kirton, 144 S.C. 89, 142 S.E. 39 (1928); Bethea v. Allen, 101 S.C. 350, 85 S.E. 903 (1915).

proves his own land, not that of another, and equity has long provided a remedy to the improving co-tenant by giving him the increased value of the property due to his improvements or by giving him that section of the property with his improvements.[14] The statute is inapplicable in foreclosure suits brought by a mortgagee, since such actions are not for the recovery of land,[15] and also in cases where the improver's occupancy has been with the permission of the owner so as to preclude disputes between landlords and tenants.[16]

The statute as it appears today provides alternative methods of claiming compensation for betterments depending on the circumstances of the particular case.[17] Under the method originally provided and presently prescribed in the first section of the statute, if the defendant in ejectment, or those under whom he claimed, believed *at the time of purchase* that they were receiving a good title, the claim for compensation must be made in a direct action brought within forty-eight hours after final judgment[18] of the action in ejectment at which the plaintiff was successful.[19] Under the terms of this section the defendant in ejectment could recover the full value of all improvements made by himself or by the one from whom he purchased the land if, at the time of purchase, he supposed that he was receiving a good title, and this right would not be jeopardized if at the time of building the improvements the occupant had notice of a possible defect in his title.[20]

The second method of asserting a claim is provided in section 57-407. This section was introduced in 1893 and read as follows:

> In any action hereafter brought, or now pending, and which has not been heard, for the recovery of lands and tenements, whether such action is denominated legal or equitable, the defendant, who may have made improvements or better-

14. Hall v. Boatwright, 58 S.C. 544, 36 S.E. 1001 (1900); McGee v. Hall, 28 S.C. 562, 6 S.E. 566 (1888).

15. Lessly v. Bowie, 27 S.C. 193, 3 S.E. 199 (1887).

16. S.C. CODE ANN. § 57-410 (1962).

17. S.C. CODE ANN. §§ 57-401, -407 (1962).

18. "Final judgment" has been interpreted to mean the final determination of the issues by jury verdict in the circuit court rather than the entry of formal judgment, Godfrey v. Fielding, 21 S.C. 313 (1884), even where the case is subsequently appealed, Garrison v. Dougherty, 18 S.C. 486 (1883).

19. S.C. CODE ANN. § 57-401 (1962).

20. Salinas v. Aultman Co., 45 S.C. 283, 22 S.E. 889 (1895); Tumbleston v. Rumph, 43 S.C. 275, 21 S.E. 84 (1895); McKnight v. Cooper, 27 S.C. 92, 2 S.E. 842 (1887); Templeton v. Lowry, 22 S.C. 389 (1885).

> ments on such land believing at the time that his title thereto was good in fee, shall be allowed to set up in his answer a claim against his plaintiff for so much money as the land has been increased in value in consequence of the improvements so made.[21]

The effect of this section was to modify and supplement section 1952[22] by providing a different method of asserting the claim under a different set of facts.[23] If the defendant in ejectment believed *at the time he made the improvements* that his title was good, though not necessarily believing so at the time of purchase, he might make his claim in his answer.[24] However, this section would not allow the defendant in ejectment to file a claim in his answer for the value of improvements made by the one from whom he acquired the land even if that person thought his title to the land was good when he made the improvements. This interpretation was arrived at in *Bethea v. Allen*.[25] There the court noted that, even though a purely arbitrary distinction between an improver and one claiming under an improver was created, the statute was unambiguous on the point and any change would have to be made by the legislature; but until then a claim for improvements made by one claiming under the improver would have to be made in a separate direct action as provided in section 1952.[26] Subsequently in 1917, section 1957[27] was amended by the addition of the following:

> or betterments made by any person under or through whom he claims, if it be shown that the defendant actually believed he was taking good title in fee simple thereto at the time of the alleged taking thereof.[28]

After the addition of this clause the section appeared in substantially its present form. The effect of this amendment, which may have been prompted by the opinion in *Bethea v. Allen*,[29] was to permit the defendant in ejectment to claim the value of

21. § 1957 Revised Statutes (1893) (now S.C. CODE ANN. § 57-407 (1962)).
22. Revised Statutes (1893) (now S.C. CODE ANN. § 57-401 (1962)).
23. Salinas v. Aultman Co., *supra* note 20; Gadsden v. Desportes, 39 S.C. 131, 17 S.E. 706 (1893).
24. Tumbleston v. Rumph, *supra* note 20; Aultman v. Utsey, 41 S.C. 304, 19 S.E. 617 (1894); Gadsden v. Desportes, *supra* note 23.
25. 101 S.C. 350, 85 S.E. 903 (1915).
26. Revised Statutes (1870) (now S.C. CODE ANN. § 57-401 (1962)).
27. Revised Statutes (1870) (now S.C. CODE ANN. § 57-407 (1962)).
28. Civ. Code '22 § 5301 (now S.C. CODE ANN. § 57-407 (1962)).
29. *Supra* note 25.

the improvements made by the previous occupant in his answer, if, at the time of making the improvements, the occupant thought his title to the land was good and if, at the time of purchase, the defendant in ejectment thought he was getting a good title.[30] The right to compensation for improvements under either section 57-401 or 57-407[31] requires the allegation and proof of facts which give rise to the claim and bring it within the scope of one section or the other.[32]

B. The Constitutionality of Betterment Statutes

The constitutionality of the betterment statutes has generally been upheld in the United States against the claim that it impairs vested rights.[33] The constitutionality of the South Carolina statute was upheld in *Lumb v. Pinckney*.[34] The court first pointed out that the policy of the statute was to remedy the inadequacies of the existing law by protecting the equity of one who improved another's land by mistake. They then upheld the right of the legislature to enact such a law, because the state constitution contained no prohibition express or implied against it. The court rejected the contention that the statute violated the right to hold and enjoy property by pointing out that the constitution also protects equitable rights and that the property rights of the improver in his improvements would lack protection but for the act. The court also rejected the argument that the statute deprived the owner of his land without due process for the reason that, if this argument was sound, it would tend to make all the laws in effect at the time of the ratification of the constitution final and unalterable, virtually destroying the function of the legislature. As to the contention that it was a taking of private property without compensation, the court felt that this would be better argued by the improving occupant. It would be a taking of *his* property without just compensation if the landowner could merely appropriate it to his own use without any obligation to pay for it, whereas the landowner was being deprived of none of his property. The argument that it abridged

30. Howard v. Kirton, *supra* note 13.

31. S.C. CODE ANN. (1962).

32. Reaves v. Stone, 231 S.C. 628, 99 S.E.2d 729 (1957); Howard v. Kirton, *supra* note 13; Tumbleston v. Rumph, *supra* note 20; McKnight v. Cooper, *supra* note 20.

33. 27 AM. JUR. *Improvements* § 6 (1940); 42 C.J.S. *Improvements* § 6 (1944).

34. 21 S.C. 471 (1884).

freedom of contract was dismissed as having no application to the issue before the court.[35]

II. The Right to Compensation

A. The Good Faith of the Improver

Since the statutory remedy is to protect the equity of an improver, it follows that the maxim that "one who seeks equity must do equity" applies to the extent that an improver's claim must be based on an equitable right to the improvements, notwithstanding the fact that such improvements are on land belonging to someone else. Therefore, before an individual may take advantage of the rights and remedies under the betterment statute in South Carolina, as in most other jurisdictions, he must meet certain requirements—one of the most important being the establishment of his good faith belief in his title, either when he purchased the land or when he undertook to improve it.[36] In most jurisdictions this excludes all those that have knowledge of the owner's claim to title or are mere trespassers.[37] However, some jurisdictions will allow compensation for improvements made where good faith is lacking: for example, where the owner by his conduct may be estopped to claim lack of good faith on the part of the improver, or where the statute distinguishes between "necessary" and "useful" improvements, allowing compensation for the former but not for the latter in the absence of good faith occupancy.[38]

Some statutes attempt to define good faith, but most merely include this as a prerequisite to recovery; and there is some variation among the different jurisdictions as to what indicates good faith. Generally, good faith is present where the improver occupied the land and made the improvements in the *honest* and *reasonable* belief that he had a good title thereto.[39] One who purchases land which both he and the grantor know is owned by another is not acting in good faith; but if the one purchasing has no knowledge of the defect, he *may* be acting in good faith, in which case he may claim compensation for the improvements

35. *Id.* at 478-80.

36. S.C. Code Ann. §§ 57-401, -407 (1962).

37. 27 Am. Jur. *Improvements* § 15 (1940); 42 C.J.S. *Improvements* § 7 (1944).

38. 42 C.J.S. *Improvements* § 7 (1944); 10 Thompson, Real Property § 5305 (1924).

39. 27 Am. Jur. *Improvements* § 14 (1940); 42 C.J.S. *Improvements* § 7 (1944).

made by his grantor. The reason for this result may be explained by the fact that, even if the grantor made the improvements, the grantee paid for them when he paid the amount by which the land was enhanced in value because of the improvements. Therefore he should be allowed to recover at least this much from the landowner who is only entitled to the land in its unimproved state. One who had occupied the land only hoping to perfect his title by the statute of limitations is of course not acting in good faith anywhere.[40]

Probably the widest variation among the jurisdictions is as to the effect of notice of an adverse claim on the good faith of the occupant. The majority view is that, where the occupant has notice that his title is deficient, he won't be allowed compensation for improvements begun after that time.[41] However, there are a substantial number of cases that will allow the occupant compensation for improvements begun after notice of the adverse claim when, in spite of the notice, he retains a strong and reasonable belief in the validity of his title.[42] In practically all jurisdictions the improver will be allowed to recover the value of his improvements begun before but completed after notice of his defect of title, particularly where to do so would preserve their value which might otherwise be lost.[43] The notice which is necessary to destroy the element of good faith is something more than a mere rumor of a possible defect, but is actual knowledge of some circumstance which if investigated further would reveal the defect in the title.[44] Constructive notice from records in some jurisdictions has been held to negate good faith, but this is not universally accepted because the occupant is not expected to know of defects not appearing in his title.[45] Notice provided by the landowner's bringing a suit in ejectment will almost always prevent recovery for improvements begun after that time, but not where they are only completed after the bringing of suit if completion would be necessary to preserve their value.[46]

In South Carolina as in most other jurisdictions, the equitable right of an improver to recover the value of his improvements

40. 10 THOMPSON, REAL PROPERTY § 5305 (1924).
41. 42 C.J.S. *Improvements* § 7 (b) (1944).
42. 27 AM. JUR. *Improvements* § 15 (1940).
43. 42 C.J.S. *Improvements* § 7 (b) (1944).
44. 42 C.J.S. *Improvements* § 7 (b) (1944).
45. 27 AM. JUR. *Improvements* §§ 16, 17 (1940); 42 C.J.S. *Improvements* § 7 (b) (1944).
46. 27 AM. JUR. *Improvements* § 15 (1940); 42 C.J.S. *Improvements* § 7 (1944).

depends on his good faith or bona fide belief in the validity of his title.[47] Prior to the enactment of the statute, the South Carolina Equity Courts had long held that an improver would not be entitled to a reduction in rent by reason of his improvements where he had notice of the owner's right to the land at the time he made them.[48] In *Belton v. Briggs*,[49] however, the court indicated that notice might not prevent recovery where the improvements were clearly for the benefit of the landowner; but the court did not permit the improver to recover because he knew his title to the land was in dispute and because there was no evidence that the landowner was benefited by the improvements. This case seems to imply that one who makes improvements on another's land knowing at the time that his title is disputed might still be able to recover the value of improvements if they were beneficial to the owner for the purposes to which he intended to devote the land. However, the later South Carolina cases made no distinction between beneficial and non-beneficial improvements and only mentioned the need for good faith on the part of the improver to enable him to make a set-off against rents and profits.[50] The betterment statute eliminated the distinction altogether so that in most cases good faith is absolutely essential to recovery for any type of improvements.[51] There was also an indication that the bad faith of the improver would not preclude his recovery where the conduct of the landowner had been such as to induce the improver to occupy the land,[52] but this is beyond the scope of this note.

Since the enactment of the statute, the effect of notice on the improver's claim has been considerably diminished. The improver must still be a bona fide possessor of the land,[53] which presumably means that he genuinely believes that his title is good and that he has no notice of any adverse claims,[54] but he need only be a bona fide possessor at the time of purchase; or if he wants to make his claim for betterments in his answer he must be a bona fide possessor at least at the time he made the improve-

47. S.C. CODE ANN. §§ 57-401 to -408 (1962).
48. Belton v. Briggs, 4 Des. Eq. 465 (S.C. 1814); De Brahm v. Fenwick's Ex'rs, 1 Des. Eq. 114 (S.C. 1785).
49. 4 Des. Eq. 465 (S.C. 1814).
50. Martin v. Evans, 1 Strob. Eq. 350 (S.C. 1847).
51. S.C. CODE ANN. §§ 57-401 to -408 (1962).
52. Dellet v. Whitner, Chev. Eq. 213 (S.C. 1839).
53. S.C. CODE ANN. §§ 57-401, -407 (1962).
54. BLACK, LAW DICTIONARY (4th ed. 1951).

ments. This does not mean that by merely establishing the fact of bona fide possession at either one or the other of the two times required in the statute the improver is automatically entitled to compensation. The statute is designed to protect the equities of improvers but not at the expense of the landowner, thereby requiring a balancing of the equities of both parties. When there are facts tending to show that it would be inequitable to the landowner to permit the improver to recover even though he is within the letter of the statute, recovery will be denied because he is not within the "spirit" of the statute. Therefore, the effect of notice is important in South Carolina only to the extent that it affects the relationship between the equities of the landowner and those of the improver.[55] Where the equitable basis of the improver's claim is not destroyed by notice of a defect in his title, the South Carolina Supreme Court has been liberal in allowing recovery.[56]

The case of *Templeton v. Lowry*[57] involved a claim for the value of betterments which were made after suit was brought to recover the land. The facts out of which the suit arose are as follows. Adickes foreclosed on a mortgage against Bratton thereby acquiring the latter's land, a portion of which he conveyed to Templeton. However, prior to the foreclosure against Bratton, Lowry had executed a contract to purchase this land. In the proceeding to determine who had title to the land, Lowry prevailed[58] and Adickes refunded the money paid by Templeton for the land. Templeton then brought a direct action to recover the value of the improvements he had made after notice of Lowry's adverse claim which was provided by the former suit. The principle issue was the effect of notice on the claim. The court upheld Templeton's right to recover basing its decision on the wording of the statute—that the improver have a bona fide belief in his title at the time of purchase, and that once this is established subsequent notice does not affect his claim.[59] Apparently Templeton's equitable right to compensation was not impaired by the fact that he had notice of the adverse claim at the time he made the improvements, but the court didn't pursue this aspect of the case in any detail and appeared to base its decision solely on the ground that Templeton believed at the time of purchase

55. Youmans v. Youmans, 128 S.C. 31, 121 S.E. 674 (1923); Gadsden v. Desportes, *supra* note 23; Johnson v. Harrelson, 18 S.C. 604 (1883).

56. Bethea v. Allen, *supra* note 25; Templeton v. Lowry, *supra* note 20.

57. 22 S.C. 389 (1885).

58. Adickes v. Lowry, 12 S.C. 97 (1879).

59. Templeton v. Lowry, *supra* note 57, at 392.

that he was getting good title. However, the court must have been aware of the decision in *Johnson v. Harrelson*[60] (which arose only six years previously and denied recovery on substantially the same facts) and of the equitable nature of the remedy; therefore *Templeton v. Lowry*[61] may only be considered authority for the proposition that notice by itself will not prevent recovery for improvements made thereafter. When considered in the light of the other cases on the point,[62] it is well settled that the right to compensation is not absolute but depends on the equity of the improver.

The foregoing is a summary of the South Carolina position on what circumstances will not destroy the requisite element of good faith. Based on the relatively few cases that have dealt with this point, it may be said that South Carolina has a fairly liberal attitude toward the rights of good faith improvers. Since good faith is a jury question,[63] the cases generally go no further than to determine whether the occupant had a genuine belief in his title,[64] and most of the cases appear to revolve around the requirement of color of title, which will be considered later. As is true in most jurisdictions, one who procures a deed by fraud or who knows the deed is invalid[65] is not acting in good faith in South Carolina. However, in *Rabb v. Flenniken*[66] compensation for improvements was allowed where the defendant in ejectment had knowingly purchased the land in breach of a trust. The beneficiary of the trust had approved the sale, but since he was incompetent to act, it was subsequently set aside. The plaintiff claimed rents and profits and Flenniken claimed compensation for betterments. The court allowed the claim for betterments in spite of Flenniken's knowledge of the terms of the trust (which gave him at least *constructive* knowledge that he would not be getting a good title) apparently because he had been advised by "eminent counsel" that his title would be good. This case is unique in that the court has not been faced with a similar situation since. But with the complexities of law being what they

60. *Supra* note 55.
61. *Supra* note 57.
62. Youmans v. Youmans, *supra* note 55; Gadsden v. Desportes, *supra* note 23; Johnson v. Harrelson, *supra* note 55.
63. Salinas v. Aultman Co., *supra* note 23; Gadsden v. Desportes, *supra* note 23; Templeton v. Lowry, *supra* note 57.
64. MaCauley v. Howard, 230 S.C. 140, 94 S.E.2d 393 (1956); Salinas v. Aultman Co., *supra* note 20.
65. Reaves v. Stone, *supra* note 32.
66. 32 S.C. 189, 10 S.E. 943 (1890).

are and the tendency of laymen to rely on the advice of counsel when purchasing land, the court might well find that one who purchased a defective title relying on the advice of counsel was acting in good faith and should be entitled to compensation for his improvements even though he is not entitled to retain the land.

B. Possession and Color of Title

In addition to the element of good faith, there is the requirement in most jurisdictions that the occupant be in possession of the land[67] and that his occupancy be under color of title.[68] As to possession, it must be adverse and actual as opposed to constructive and permissive. Adverse possession is usually that possession which would ripen into a fee after the passage of the number of years needed to create title by prescription, but adverse possession has been held in some cases to mean nothing more than possession in ignorance of the owner's title.[69] Adverse possession in practically all states precludes occupation with the permission of the owner since the occupant is technically not a possessor and because he has knowledge of the owner's title.[70] Actual possession has been held to mean something less than complete personal occupancy, so that this requirement is satisfied if the land is occupied by a tenant or agent acting for the improver or if the improver has maintained the property and used it for industrial or agricultural purposes.[71] A few states have the additional requirement that possession be for a certain period of time before there is a right to claim improvements.[72]

The principal provisions of the South Carolina statute are that the occupant (1) purchase the land, (2) suppose that his title is good in fee either at the time of purchase or when he makes the improvements, and (3) occupy the land adversely to the interest of the owner.[73] The third requirement (inferentially) of

67. 27 Am. Jur. *Improvements* §§ 8, 9 (1940); 42 C.J.S. *Improvements* § 7 (c) (1944).
68. 27 Am. Jur. *Improvements* § 11 (1940); 42 C.J.S. *Improvements* § 7 (d) (1944).
69. 27 Am. Jur. *Improvements* § 9 (1940); 42 C.J.S. *Improvements* § 7 (c) (1944).
70. 27 Am. Jur. *Improvements* § 9 (1940); 42 C.J.S. *Improvements* § 7 (c) (1944).
71. 27 Am. Jur. *Improvements* § 8 (1940); 42 C.J.S. *Improvements* § 7 (c) (1944).
72. 27 Am. Jur. *Improvements* §§ 8, 9 (1940); 42 C.J.S. *Improvements* § 7 (1944).
73. S.C. Code Ann. § 57-410 (1962).

adverse possession by the improver is the closest the statute comes mentioning possession at all. If the improver was in possession of the land with the permission of the owner, he will be precluded from asserting any claim for betterments

> . . . unless it shall appear on the trial of the action, that such owner has neglected to fulfill such contract of his part, in which case such person in possession shall be entitled to all the privileges in this chapter provided for those who entered upon land under supposed title and the same proceedings shall be had and the land shall be held in the same manner as herein provided for.[74]

The court, however, has not been strict in applying this requirement probably because it is not specifically stated in the statute. If the term "adverse possession" had been used, the court might have defined it in terms of that possession which would eventually ripen into a fee, but instead the statute merely provides that the occupancy may not be permissive so that the "adverse possession" required by the court may mean, as in some jurisdictions,[75] possession in ignorance of the owner's title. In *Shute v. Shute*,[76] the defendant in ejectment was permitted to recover the value of the improvements he made in spite of the fact that there was evidence tending to show that he had occupied the land with the permission of the owner (his father) and that there was no breach of contract which would bring the case within the exception in section 57-410.[77] The requirement of actual possession which is necessary in some jurisdictions is completely disregarded by the statute and none of the reported cases mention it. The reason for this may be found in the fact that under the South Carolina statute an occupant of land need not have been in possession of the land when the improvements were made—the provision which allows him to recover the value of improvements made by the one from whom he acquired the land[78] is fairly unique and is not found in many other jurisdictions.

Color of title is the second major prerequisite to recovery which must be met by a good faith improver. As will be seen later, color of title is closely related to good faith to the extent

74. *Ibid.*
75. 27 AM. JUR. *Improvements* § 9 (1940); 42 C.J.S. *Improvements* § 7 (c) (1944).
76. 82 S.C. 264, 64 S.E. 145 (1909).
77. S.C. CODE ANN. (1962).
78. Salinas v. Aultman Co., 45 S.C. 283, 22 S.E. 889 (1895).

that it will not be present when the deed or instrument purporting to convey title is procured by fraud. Color of title is the appearance of title but is imperfect in some way not readily apparent to the one asserting it. In most jurisdictions there can be no color of title where the occupant is not holding under some deed or other written instrument of title, whether or not it is in his possession, so that color of title is missing where the occupant is in possession of the land under an oral promise to convey.[79]

The early South Carolina decisions did not mention color of title specifically, but referred only to the improver's good faith belief in his title. However, in the few cases that allowed the improver to set off the value of his improvements against the owner's claim for rent, he had occupied the land under circumstances that resembled the modern concept of color of title. This is best illustrated in *Martin v. Evans*[80] where the improver occupied the land under a deed acquired at a sheriff's sale which was subsequently found to be invalid. The betterment statute contains no specific requirement of color of title except inferentially from the supposition of the occupant that he is getting a good title. In view of the fact that color of title is related to good faith and because the statute is designed to "work out the equities of a good faith improver,"[81] the cases have generally held that there has to be some reasonable claim to title which will set the improver apart from the ordinary trespasser,[82] and the court has appeared to follow the majority view with regard to color of title. In *Salinas v. Aultman*,[83] a controversy arising out of the prior action of *Aultman v. Utsey*,[84] the plaintiff claimed the value of betterments made by the defendant in ejectment, Utsey. The facts out of which the first action arose were that Utsey had acquired the land in question after a series of mesne conveyances from one Pope, the original owner of the land, and a debtor of Aultman. Utsey mortgaged the land to Salinas who subsequently foreclosed the mortgage and received a master's deed of conveyance at the sale. In the first action Aultman succeeded in having the conveyances which subsequently vested title in Utsey set aside as a fraud on the creditors of Pope. This also invalidated

79. Annot., 71 A.L.R.2d 404 (1958); 27 AM. JUR. *Improvements* §§ 10-12 (1940); 42 C.J.S. *Improvements* § 7 (1944).

80. *Supra* note 50.

81. Tumbleston v. Rumph, 43 S.C. 275, 21 S.E. 84 (1895).

82. Cayce Land Co. v. Guignard, 135 S.C. 446, 134 S.E. 1 (1926).

83. 45 S.C. 283, 22 S.E. 889 (1895).

84. 41 S.C. 304, 19 S.E. 617 (1894).

the master's deed of conveyance, but nevertheless, the deed was sufficient to establish color of title and on that basis Salinas was able to recover the value of Utsey's improvements.

Recovery was denied an improver in *Cayce Land Co. v. Guignard*[85] since the basis of his claim to title was an oral promise to convey under which no deed ever passed. For this reason the court held the defendant to have no greater right or claim to compensation than any other trespasser. In *National Surety Co. v. Carstens*,[86] the defendant acquired his title to the land he improved through a partition among the other cotenants, all of whom were heirs of his father's estate. The court held that there was ample evidence to prove that at the time of the partition the defendant did not know of the plaintiff's paramount claim against the estate to which the land was subject; therefore, his occupation and improvement of the land was made in the good faith belief that his deed was valid. Since both the elements of good faith and color of title were present, the defendant was held entitled to the value of his improvements.

A claim for compensation was denied in *Smith v. Hanna*[87] with the court holding that there was no color of title where the improver was merely on the land under an expectancy of an inheritance. The land had been devised to Mary Nesmith in terms which appeared to give her only a life estate with remainder to her children, in this case Anna Hanna, one of the co-defendants. Mary Nesmith conveyed the land to the plaintiff who brought this action in ejectment to dispossess the defendants. The defendants claimed the deed to the plaintiff was invalid and counterclaimed for improvements. The court interpreted the devise to Mary Nesmith to give her a fee conditional which had ripened into a fee absolute enabling her to convey the land to the plaintiff. The defendant's possession of the land was clearly supported by no color or claim of title which would maintain an action under the betterment statute, and they certainly could not have been said to be in ignorance of Mary Nesmith's exclusive right to the land even if her interest was only for the duration of her life.

Compensation for improvements was allowed in *McCauley v. Howard*[88] where the defendant in ejectment held the land under

85. *Supra* note 82.
86. 159 S.C. 222, 156 S.E. 336 (1930).
87. 215 S.C. 520, 56 S.E.2d 339 (1949).
88. 230 S.C. 140, 94 S.E.2d 393 (1956).

a deed which was invalid because of a lack of title in the grantor, a fact of which the defendant was not aware. In *Reaves v. Stone*,[89] the claim for improvements was denied despite the fact that the defendant in ejectment held the land under a tax deed, because he knew that the deed was void on its face. The land occupied by the defendant was part of the estate of the defendant's deceased brother which had passed to the decedent's wife and children. The defendant acquired the land when it was attached and sold for non-payment of delinquent taxes. The invalidity of the deed came from the fact that it named the decedent as grantor instead of the plaintiffs to whom title to the land had passed. This and other facts about which the defendant was well aware gave him at best a questionable title which was insufficient to enable him to claim compensation for improvements.

In *Dunham v. Davis*,[90] another case involving a tax deed which was invalid because the land was conveyed by the decedent's estate on which there had been no administration, the claim for the value of improvements was upheld. However, in this case the improver had no knowledge of the invalidity of the tax deed. These two cases provide a good example of the relationship between color of title and good faith. Both claimants were in possession of the land under an invalid tax deed, but where the claimant had knowledge of its invalidity, his claim was denied.

From the foregoing it may be concluded that South Carolina follows the majority view as to what constitutes color of title and requires that the claimant occupy the land under a deed or other written instrument purporting to convey title. The reason for this becomes apparent when consideration is given to the equitable nature of the betterment statute as pointed out in *Tumbleston v. Rumph*.[91] It would not be equitable to the landowner to require him to pay for improvements he did not authorize where the one making them had no right or claim to the land, no matter how slight, which would create an equitable right to his improvements. For this reason the improver's possession of the land must be based on something in writing which would appear valid to one acting in good faith. However, the deed does not necessarily have to be in the possession of the one occupying the land. In *Shute v. Shute*,[92] the defendant in ejectment held the

89. 231 S.C. 628, 99 S.E.2d 729 (1957).
90. 232 S.C. 175, 101 S.E.2d 278 (1957).
91. 43 S.C. 275, 21 S.E. 84 (1895).
92. 82 S.C. 264, 64 S.E. 145 (1909).

land under a deed which he claimed his father had conveyed to him as a gift. The deed was valid and would have conveyed a good title to the land except for the fact that it was not delivered. Nevertheless, the defendant was entitled to the value of his improvements under the betterment statute.

C. What are Improvements?

While good faith and color of title may be the two most important prerequisites to recovering the value of improvements, there is yet a third which concerns the nature of the betterments for which compensation may be had. The improvements for which a defendant in ejectment may be compensated are usually those which add to or enhance the value of the land and which are of a permanent and beneficial nature.[93] This distinguishes them from repairs or improvements of a temporary nature. The characteristic feature of improvements is that they are permanent accessions to the freehold that may not be removed because of the resulting damage to the realty, which excludes trade fixtures from this category. Buildings such as houses, barns, garages and miscellaneous farm buildings are the most usual form of improvements; but improvements may also include preparing the land for subdivision, laying roads and sidewalks, planting orchards and erecting fences.[94] The list is virtually endless. While repairs are usually not compensable as improvements, numerous cases have allowed recovery for them. However, these repairs are usually of such a substantial and beneficial nature in themselves that there may be little difference between them and improvements, such as the complete renovation of a house. Some courts tend to disregard the nature of the repair but use the discretion they have in equity proceedings to decide the extent to which compensation will be allowed for repairs.[95]

Prior to the enactment of the betterment statute in South Carolina, there were no cases that even considered the issue of the type of improvements for which one could claim compensation. Occasionally, the court would mention what improvements the defendant in ejectment made, such as buildings[96] or clearing timberlands,[97] without commenting further. This prob-

93. 27 AM. JUR. *Improvements* § 19 (1940); 42 C.J.S. *Improvements* § 1 (1944).

94. Annot., 24 A.L.R.2d 11 (1952).

95. Annot., 24 A.L.R.2d 11 (1952).

96. Withers v. Yeadon, 1 Rich. Eq. 324 (S.C. 1845).

97. Belton v. Briggs, *supra* note 48.

lem was not solved by the enactment of the statute since it contains no definition of improvements, and until fairly recently the issue had not appeared before the South Carolina Supreme Court. The early cases decided under the act were no more illuminating than those decided before the statute. The court seldom went further than to point out that the improvements represented a valuable expenditure by the defendant in ejectment which enhanced the value of the realty,[98] or to mention the improvements for which the defendant was claiming compensation.[99]

In *Reaves v. Stone*,[100] however, the court itemized the list of improvements which the defendant claimed and had been awarded by the master. It should be remembered that the defendant was held not entitled to any compensation because of his lack of good faith in occupying the land. When the case was appealed by the defendant, the plaintiff made no motion to reverse the award of compensation for the improvements made by the defendant, giving as a reason that, even if they were successful in having the award reversed, they would not gain anything because they would not be able to collect the amount they were entitled to as rent from the defendant. The amount awarded the plaintiffs for rent more than cancelled out the compensation for improvements awarded the defendant. Therefore, the court did not reverse the award of compensation to the defendant but refused to allow the appeal for additional compensation. The improvements for which compensation was approved consisted of clearing the land, installing flues in the house, roofing the house, putting in a floor and ceiling, installing brick piers under the house, installing plumbing and paying the taxes on the land as well as the interest on the taxes. There was no discussion by the court of the nature of improvements as opposed to repairs, even though some of the improvements, particularly the work done on the house, might be considered to be repairs. Thus, this case doesn't provide a very useful guideline on the question.

Less than a year later the issue was squarely before the court in the case of *Dunham v. Davis*[101] which is now the leading case on the point. The defendant in ejectment succeeded in recovering a judgment for betterments in the amount of $18,000. The im-

98. National Surety Co. v. Carstens, *supra* note 86.
99. Salinas v. Aultman Co., *supra* note 83.
100. *Supra* note 89.
101. *Supra* note 90.

provements consisted of a sum that was to "adjust the equities" of the parties and compensate the defendant for his maintenance of some timbered land, preparation of the land for tillage, a soil building program, clearing approximately sixty acres of land, building a packhouse and shed and tearing down and moving an old house. The court cited with approval the majority definition of improvements[102] in upholding the claim for compensation for all the improvements except the maintenance of the wood lot because they represented a permanent benefit which enhanced the value of the realty. No compensation was allowed for the general maintenance of the wood lot, even though its value had increased four times, because there was no expenditure of time or money except for general maintenance. The increase in value apparently came from the natural growth of the trees rather than from anything the claimant had done. The court pointed out that there might have been compensation if the claimant had undertaken to fertilize the trees, build fences or thin out scrub timber as it then would have been possible to attribute part of the increase in value to the claimant's efforts. Preparing the land for cultivation was also held not to be a compensible improvement. Unlike the soil building program which constitutes a long range benefit to the land, simply preparing the soil for cultivation adds no lasting benefit to the land. The effect of this case is to conclusively adopt for South Carolina the majority view as to what improvements are compensible. However, in view of the fact that this is the only case that has been heard on appeal on this point, it is highly probable that the established majority definition of improvements has long been applied in the lower courts of this state so that *Dunham v. Davis*[103] does not overrule any settled principles of law.

III. The Compensation to be Awarded

Once the determination is made that the defendant in ejectment is entitled to compensation for improvements, there remains the problem of deciding how much compensation will be awarded. Generally, the measure of compensation is the value by which the improvements enhance the realty, and this may be determined from the difference in the market value of the land in its improved and unimproved state. In applying the general

102. 27 Am. Jur. *Improvements* § 19 (1940); 42 C.J.S. *Improvements* § 1 (1940); Annot., 24 A.L.R.2d 11 (1952).

103. Dunham v. Davis, *supra* note 90, at 184, 101 S.E.2d at 282.

rule of measuring the value imparted to the land by reason of the improvements, the courts consider such factors as the condition of the improvements when the land is repossessed, the location of the improvements on the land and their cost to the improver either at the time they were made or their value at the time of repossession. Also, as a general rule, the cost of the improvements will not be the measure of compensation although it may be a factor to be considered in arriving at a determination of the enhancement in value of the land.[104]

A. Valuation of Improvements

The law concerning the valuation of improvements has long been settled in South Carolina and is thoroughly in accord with the majority of jurisdictions. The early equity decisions which dealt with improvements before the betterment statute was enacted allowed only the value of the improvements up to the amount of rents and profits recoverable by the owner of the land.[105] In all cases the value recoverable by the improver was held to be the amount by which the land was enhanced by reason of the improvements as reflected at the time of sale.[106] The early equity rule limiting the amount of recovery awarded to the improver to a set-off against rents and profits was specifically changed by the enactment of the betterment statute to allow the defendant in ejectment to "recover of such plaintiff in such action the full value of all improvements made upon the land by such defendant or those under whom he claims. . . ."[107] This changed the law in two important respects. First, it allowed compensation up to the full value of the improvements, which was a radical departure from the old rule at chancery, and second, it removed the requirement that the one claiming compensation for improvements must himself have made them. However, the statute made no change in the method of valuation but merely codified the old rule:

> The sum which such land shall be found at the time of such judgment to be worth more, in consequence of improvements so made, than it would have been had no such improvements

104. Annot., 24 A.L.R.2d 11 (1952).

105. Martin v. Evans, 1 Strob. Eq. 350 (S.C. 1847); Dellet v. Whitner, Chev. Eq. 213 (S.C. 1839).

106. Martin v. Evans, *supra* note 105; Withers v. Yeadon, 1 Rich. Eq. 324 (S.C. 1845); Dellet v. Whitner, *supra* note 105.

107. S.C. CODE ANN. § 57-401 (1962).

or betterments been made shall be deemed to be the value of such improvements or betterments.[108]

B. The Statutory Provisions for Compensation

When the defendant in ejectment brings his action to recover the value of his improvements under section 57-401, that is, in a separate action within forty-eight hours after final judgment in favor of the plaintiff in an ejectment action, he must allege the amount of the increase in value of the land due to all the improvements put thereon as specified in section 57-402; and these allegations in the complaint constitute notice to the plaintiff in ejectment to appear and defend against them. If the plaintiff in such action successfully proves his right to recover, he will receive a special jury verdict on the value of his betterments as of the date the land was recovered from him with interest from the date of judgment.[109] The land recovered will be held subject to a lien in his favor which will have priority over all other liens,[110] and in the event that the judgment for improvements is not satisfied within sixty days the land may be sold, and the plaintiff will be allowed the amount in excess of the unimproved value of the land up to the amount specified in the special jury verdict.[111]

When the claim for betterments is made in the defendant in ejectment's answer as provided for in section 57-407, the same rule of valuation applies with the procedural difference that the same jury will be utilized to find two verdicts—one for the plaintiff to recover his land and the other for the defendant in the amount of his improvements.[112] As may be seen from a close reading of the statute the defendant in ejectment appears almost to have paramount rights to the owner of the land, particularly when it is remembered that the occupant's right to recover against the owner for his improvements does not depend on any misconduct which would raise an estoppel against the owner.[113] It should also be remembered that at common law no right to recover the value of betterments placed on another's land existed at all, since early jurists could see no reason why a land owner

108. S.C. CODE ANN. § 57-402 (1962).
109. S.C. CODE ANN. § 57-404 (1962).
110. S.C. CODE ANN. § 57-405 (1962).
111. *Ibid.*
112. S.C. CODE ANN. § 57-408 (1962).
113. 27 AM. JUR. *Improvements* § 14 (1940).

should be required to pay for improvements which he did nothing to authorize.[114]

The case of *Howard v. Kirton*[115] provides a thorough analysis of the betterment statute with regard to the improver's right to recover. The issue before the court was an alleged conflict between the provisions of section 57-402[116] which, in a direct action to recover the value of his improvements, gives the plaintiff their full value, and section 57-405[117] which creates a lien superior to all other liens in favor of the plaintiff for the collection of his judgment, and the direction in section 57-406[118] that if the land is sold the proceeds would be first paid over to the plaintiff in ejectment up to the unimproved value of his land as found by the jury after which the excess, if any, would be paid to the defendant up to the amount awarded by the jury for his improvements. This conflict, it was argued, should be resolved in favor of the plaintiff-improver by interpreting section 57-406 as merely directory in the light of sections 57-402 and 57-405.

At the trial, the jury found in a special verdict that the improved value of the land was $3750, the value when purchased by the plaintiff-improver was $2500, and the total amount therefore due the plaintiff was $1250. The defendant then elected to sell the land to pay off the claim and the plaintiff waived the sixty day period. The proceeds from the sale were insufficient to satisfy both the claim for the improvements and the claim for the unimproved value of the land. In considering the basic question presented by the appeal concerning the conflict between the right of the improver to the full value of all the improvements and the prior right of the land owner to be first paid the unimproved value of the land out of the proceeds of the sale, the court decided in favor of the landowner. The occupying claimant does have a right to the full value of all the improvements, and he does have a lien in preference to all other liens but not in preference to the prior right of the landowner to his land which, because of his ownership of the land, is not in the nature of a lien. Therefore, if the land is sold to pay the special verdict, the plaintiff in ejectment has the right to be completely compensated up to the unimproved value of the land before the

114. 10 THOMPSON, REAL PROPERTY § 5295 (1924).
115. 144 S.C. 89, 142 S.E. 39 (1928).
116. S.C. CODE ANN. (1962).
117. S.C. CODE ANN. (1962).
118. S.C. CODE ANN. (1962).

defendant-improver may receive the value of his improvements from the excess.

On the basis of this opinion it is apparent that where the defendant in ejectment receives a money judgment of a considerable amount for his improvements, the plaintiff may simply not pay. He may suffer his land to be sold and collect its full unimproved value allowing the defendant to be compensated from whatever may be left. This may not be very much if the improvements are of a unique nature such as railroad equipment for which there might not be a ready market. While such a result may not appear to be very equitable to the improver, there is something to be said for the way that it protects the landowner's equity since otherwise he might be left with unique improvements that have no use to him. However, the court in the *Howard* case could see no particular reason for the method provided by the statute which determines the respective shares of the contesting parties merely by allowing one to take preference over the other. They observed that a more equitable solution would ensue if the jury were to find a verdict based on the proportional value of the improvements to the land. Then, regardless of the amount of proceeds from the sale, each party would receive a proportional amount.

The plaintiff had also claimed an exception on the basis that the verdict was not in the proper form; that is, that the jury had not determined the unimproved value of the land but had based their finding on the purchase price of the land as paid by the plaintiff. This error becomes significant when it is remembered that the occupying improver is entitled to the full value of *all* the improvements placed on the land, either by himself or by the one under whom he claims,[119] and that in this case the purchase price represented the value of improvements placed on the land by the prior occupant. However, the court disposed of this ground of appeal by holding that any mistake in the verdict or in the charge to the jury should have been raised at the trial.

Justice Cothran dissented, arguing that, when all the sections of the statute are read together, they definitely give the plaintiff a superior claim to everyone including the landowner. *National Surety Co. v. Carstens*[120] may have vindicated Justice Cothran. There the court gave the defendant in ejectment a lien superior

119. S.C. CODE ANN. §§ 57-401, -407 (1962).
120. 159 S.C. 222, 156 S.E. 336 (1930).

to the plaintiff's up to the amount to which he was entitled for his improvements when the land was sold. However, this case should not be understood as overruling *Howard v. Kirton*[121] because of substantially different circumstances under which the plaintiff in ejectment claimed title to the land. In the *Howard* case the plaintiff in ejectment was attempting to recover land that he rightfully owned, but in *National Surety Co.* the plaintiff was merely attempting to have the land sold in payment of a debt. The order of the court decreeing the sale then gave him a lien on the land which under the terms of the betterment statute would be subordinated to the lien of the improver. One further advantage of the improver's lien that is worth noting is that homestead property, which normally can't be reached by creditors, is subject to it under the authority of the South Carolina Constitution.[122]

The value of betterments which the improver is entitled to recover is well settled in both the statute[123] and the cases[124] to be the enhancement in value of the land because of the improvements and not the cost of the improvements themselves. However, the cost of the improvements may still be considered and, in the absence of other evidence, may be the amount actually awarded. In *Dunham v. Davis*,[125] the defendant in ejectment was awarded the following amounts for improvements at the trial; $1271.17 for the construction of a packhouse and shed, $234 for tearing down and moving an old house, $5476.35 for clearing about sixty acres of land and $1904.83 for a soil building program.[126] The value awarded at the trial was based on the cost of the improvements rather than on the value which they imparted to the land. The evidence put forth by the landowner only disputed the cost of the improvements and did not attempt to show that the actual increase in value of the land was less than the cost of the improvements; however, there was some evidence indicating that the cost of clearing the land was greater than the resulting increase in value. For this reason all the amounts awarded by the master except those for clearing the land were

121. *Supra* note 115.

122. S.C. CONST. art. 3, § 28 (1962); Wilson v. Counts, 52 S.C. 218, 29 S.E. 649 (1898).

123. S.C. CODE ANN. § 57-402 (1962).

124. Howard v. Kirton, *supra* note 115; Harmon v. Harmon, 54 S.C. 100, 31 S.E. 881 (1898).

125. *Supra* note 90.

126. There were other amounts awarded for items that were held on appeal not to be improvements and therefore won't be considered here.

affirmed. This case doesn't change any principles of law, but it does stand for the proposition that in the absence of any other evidence the cost of the improvements may be the amount actually awarded.

C. Compensation to be awarded the Landowner

It has long been the rule that a landowner who has been deprived of the use of his land is entitled upon the recovery of it to the payment of those rents and profits which he could get by bringing his claim in an equity court. In fact it was this right which originally gave rise to the equitable claim of the occupant to be compensated for his improvements.[127] However, there have been cases where the claim for rents and profits has been denied, such as where the owner has by his conduct mislead the occupant into occupying the land, or where the land has no rental value apart from the improvements.[128] The period for which rents and profits may be claimed usually extends only to the period of actual possession of the occupying claimant and not to the period of the one under whom he claims unless the improver may make a claim for the improvements made by his predecessor. Usually the rent and profits charged are on the unimproved value of the land, except in cases where the improvements were made in bad faith or the improvements were needed to prepare the land for its use. Some jurisdictions by statute provide for the rent to include the value added by the improvements particularly in those cases where the improver's recovery is determined by his expenditures, where he is allowed interest on the amount spent, or where he is allowed to recover the value of his improvements beyond the amount of rents and profits.[129]

South Carolina has long followed the view that the right to land implies a right to the profits accruing therefrom,[130] but until the betterment statute was enacted it was not clear whether the rent would be on the land in its improved or unimproved state. Section 57-409 reads as follows:

> The plaintiff in an action for the recovery of lands and tenements shall recover nothing for the mesne profits of the

127. Annot., 57 A.L.R.2d 263 (1958).
128. 42 C.J.S. *Improvements* § 12 (1944).
129. Annot., 24 A.L.R.2d 11 (1952).
130. Martin v. Evans, *supra* note 105.

land, except on such improvements as are made by him or those under whom he claims.[131]

The section has been interpreted to give the plaintiff in ejectment only the rent which the land would bring in its unimproved state,[132] and where the land has no rental value apart from the improvements no rent at all may be collected.[133]

IV. Conclusion

There have not been many cases decided under the betterment statute in South Carolina, but among those that have, three trends may be observed. First, the decisions seem to adopt a liberal interpretation of the statute despite the fact that it is in derogation of the common law. There are numerous indications from the cases that this is because of its remedial nature.[134] Second, the courts have recognized its equitable nature and have used their discretion to insure that only those whose conduct has the support of equity will be entitled to recover.[135] Third, where the case law has been sparse on a particular point the court has tended to follow the rule adopted by the majority of jurisdictions.[136] Of these three trends, the equitable nature of the remedy and its application by the court is the most important and must be kept in mind by one seeking to invoke the aid of the betterment statute. In short, one who seeks equity must do equity.

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131. S.C. Code Ann. § 57-409 (1962).
132. Reaves v. Stone, 231 S.C. 628, 99 S.E.2d 729 (1957).
133. Jacobs v. Bush, 17 S.C. 594 (1882).
134. Howard v. Kirton, *supra* note 115; Tumbleston v. Rumph, *supra* note 91.
135. Youmans v. Youmans, 128 S.C. 31, 121 S.E. 674 (1923); Gadsden v. Desportes, 39 S.C. 131, 17 S.E. 706 (1893); Johnson v. Harrelson, 18 S.C. 604 (1883).
136. Dunham v. Davis, *supra* note 90.